LEGAL AND INSTITUTIONAL ANALYSIS OF STATE WATER LAW

A legal and institutional analysis of State Water Law was conducted to identify legal and institutional instream flow related opportunities and needs for the Sheyenne River and the Red River of the North, North Dakota and Minnesota. The analysis emphasized North Dakota Water Law. The analysis was considered an update to Nelson et al. (1978). In Nelson et al. (1978), the U.S. Fish and Wildlife Service's Biological Services Program identified and evaluated the most promising institutional methods for reserving instream flows to benefit fish and wildlife in North Dakota. The text dealing with legal issues associated with the protection of North Dakota instream flows was taken from several sources, but primarily from Krenz (1998), Delmore (1997), Sagsveen (1977), and supplemented by other information provided by staff of the North Dakota State Water Commission as well as information posted on the North Dakota Water Law web site. Appendix K contains the full text of the Legal and Institutional Analysis of State Water Law.

In a 1986 survey of the United States and Canadian provinces, Reiser et al. (1989) identified legislation protecting instream flow in 16 States, 12 of which were west of or along the 100th meridian. Instream flow regulations in the Western States have more recently been reviewed by McKinney and Taylor (1988) and MacDonnell et al. (1989). Thirteen of the States have specifically designated recreation as a legitimate reason for protecting instream flows (i.e., beneficial use). Only six of the States allow for protection of instream flows for aesthetic or scenic reasons. However, several of the States allow instream flow rights to protect water quality as a way of protecting aesthetic quality. In several states, natural resource department personnel consider water quality protection to be the means for preserving aesthetic quality of riverine areas (Shelby et al. 1982). Aquatic life, water quality, and recreation are directly benefitted by the designation of other uses as a "beneficial use." In California, the State's granting and regulation of permits and licenses, water quality management, and application of the public trust doctrine all offer opportunities that sometimes have the effect of protecting instream flows (Gray 1989).

The traditional requirements for a valid water claim in the West include: (1) intent to apply the water to a beneficial use, (2) actual diversion of water from a naturally occurring water body, and (3) application of the water to a beneficial use within a reasonable time. The designation of "beneficial use" water rights for preserving fish and wildlife habitat, water quality, or for maintaining riverine resources for recreational use has not been the primary impediment to instream flow regulations (Shelby et al. 1982). The difficultly most often encountered is the traditional requirement that water be diverted from natural water courses in order to establish a water right under the Prior Appropriation doctrine (Tarlock 1978, 1979). The appropriation doctrine emphasizes diversion under the principles of beneficial use and "first in time" being "first in right."

North Dakota Water Law

Section 3 of Article XI of the North Dakota Constitution states, "All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and

manufacturing purposes." The appropriation of water in the State of North Dakota is by statute the responsibility of the State Engineer. Chapter 61-04 of the North Dakota Century Code (N.D.C.C.) addresses the appropriation of water in the State. The State Engineer has adopted rules contained in Chapters 89-03-01, 89-03-02, and 89-03-03 of the North Dakota Administrative Code. The manner in which hearings are conducted by the State Engineer pursuant to the provisions of Chapter 61-04 are bound by Chapter 28-32 of the N.D.C.C., more commonly known as the Administrative Agencies Practice Act.

N.D.C.C. § 61-28-02(11) defines waters of the state as: "all waters within the jurisdiction of this state including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters that do not combine or effect a junction with natural surface or underground waters just defined."

N.D.C.C. § 61-04-01.1 defines beneficial use as: "a use of water for a purpose consistent with the best interests of the people of the state."

N.D.C.C. § 61-04-01.1 defines fish, wildlife, and recreation use as: "the use of water for the purposes of propagating and sustaining fish and wildlife resources and for the development and maintenance of water areas necessary for outdoor recreation activities."

Chapter 61-04-01.2 requires that a right to appropriate water can be acquired for beneficial use only as provided in Chapter 61-04 (Appropriation of Water). Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.

Chapter 61-04 requires that an appropriation of water involve an actual diversion and works before a water permit may be issued. The legislature has not provided a mechanism for the issuance of water permits specifically for the preservation of a naturally occurring instream flow. However, under existing state law, a water permit can be issued for a project to divert or store water and release it to maintain an instream flow. The existing water permit issued for the Garrison Diversion Project allows project water to be delivered to satisfy instream flow needs and the water is protected from downstream diversion under existing state law.

N.D.C.C § 61-04-06 (emphasis added below) lists the factors the State Engineer must consider in making a determination about whether to issue a water permit. That section provides, in part:

The State Engineer shall issue a permit if the state engineer finds all of the following:

1. The rights of a prior appropriator will not be unduly affected.
2. The proposed means of diversion or construction are adequate.
3. The proposed use of water is beneficial.

4. The proposed appropriation is in the public interest. In determining the public interest, the State Engineer shall consider all of the following:
    a. The benefit to the applicant resulting from the proposed appropriation.
    b. The effect of the economic activity resulting from the proposed appropriation.
    c. The effect on fish and game resources and public recreational opportunities.
    d. The effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation.
    e. Harm to other persons resulting from the proposed appropriation.
    f. The intent and ability of the applicant to complete the appropriation.

There are six factors the State Engineer must consider when determining whether a proposed appropriation is in the public interest (4.a.-f. above). The six factors are considered and the determination of public interest is a judgment decision made by the State Engineer. One of the six factors the State Engineer must consider is the effect on fish and game resources and public recreational opportunities (4.c.). This is the avenue through which impacts to aquatic resources are considered in the existing appropriation process.

Chapter 28-32 specifies that the decision must be based on information introduced into the hearing record. Section 89-03-01-06.3 identifies a list of data commonly used in evaluating permit applications which, unless specifically excluded by the hearing officer, are automatically included in the hearing record, and all parties attending the hearing are informed that this information has been taken into the record. Section 89-03-01-06.1 outlines the procedure to be used by the State Engineer to consider additional information not made a part of the record during the hearing process.

When there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the State Engineer shall adhere to the following order of priority (N.D.C.C. § 61-04-06.1 Preference in granting permits):

1. Domestic use.
2. Municipal use.
3. Livestock use.
4. Irrigation use.
5. Industrial use.
6. Fish, wildlife, and other outdoor recreational uses.

In determining whether the proposed appropriation is in the public interest, the State Engineer must evaluate each of the items listed above in N.D.C.C. § 61-04-06.2 (4.a.-f.). If, when evaluated and balanced with the other factors, the State Engineer determines that the potential effect on fish and game resources or public recreational opportunities would be detrimental, and on a whole that the public interest would not be served by issuance of a water permit, the State Engineer could deny the permit, or could issue the permit with conditions to protect fish and game resources or public recreational opportunities. Such a condition could require, if supported by the

evidence, the requirement that water may be diverted from a stream or lake only when flows exceed a certain level. If an applicant requests a permit to impound water, a condition could be added to require releases to be made to augment flows. The determination of what elements of the public interest are impacted, and what the public interest requires is committed to the sound discretion of the State Engineers. Shokal v. Dunn, 707 p. 2d 441 (1985).

Reservations of water, water permits for instream flow associated with the construction of works, Attorney General's opinions/Judicial opinions, specific legislation, Water Commission policies, and Federal authority are more fully addressed in Appendix K.

Minnesota Water Law

Minnesota Statute 103G.265 requires the Minnesota Department of Water Resources to manage water resources to ensure an adequate supply to meet long-range seasonal requirements for domestic, agricultural, fish and wildlife, recreational, power, navigation, and quality control purposes. The Water Appropriation Permit Program exists to balance competing management objectives that include both development and protection of Minnesota's water resources.

Water law in Minnesota is governed by riparian rights. Riparian water rights, or eastern water law, state that the owner of land containing a natural stream or abutting a stream is entitled to receive the natural flow of the stream limited only by the equal rights of the other riparian owners. The riparian owner is protected against the diversion of water except for domestic purposes upstream from his property and from the diversion of excess flood flows toward his property.

The Minnesota Department of Natural Resources has established minimum instream flows using a hydrologic method (i.e., 90 % exceedance flow) as a guideline. Using this method, the Minnesota Department of Natural Resources established a minimum instream flow for the Red River of the North of 38 cfs at Fargo, North Dakota.

Legal and Institutional Analysis Summary

It does appear that there are means and measures available in North Dakota Water Law to protect instream flows, whether it be by appropriations, judicially, acquisition and transfer, water quality enforcement mechanisms, or in the planning process. Minnesota appears to have a mechanism in place by which they can establish minimum instream flows.